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**VIA ELECTRONIC FILING**

Clerk of the Commission  
c/o Document Control Center  
State Corporation Commission  
P.O. Box 2118  
Richmond, VA 23218

**Re: *In re: Virginia Electric and Power Company's Integrated Resource Plan filing pursuant to Va. Code § 56-597 et seq.***  
**Case No. PUR-2020-00035**

Dear Sir:

Pursuant to the Commission's Rule 5 VAC 5-20-170 and Paragraph 7 of the Hearing Examiner's Protective Ruling and Additional Protective Treatment for Extraordinarily Sensitive Information in this case, please find enclosed for filing the following Reply on behalf of the Office of the Attorney General's Division of Consumer Counsel.

Thank you for your assistance in this matter.

Sincerely,

/s/ John E. Farmer, Jr.

John E. Farmer, Jr.  
Assistant Attorney General

cc: Service List

**COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION**

**COMMONWEALTH OF VIRGINIA, *ex rel.***

**STATE CORPORATION COMMISSION  
COMPANY**

**CASE NO. PUR-2020-00035**

**In re: Virginia Electric and Power Company's  
Integrated Resource Plan filing pursuant to  
Va. Code § 56-597 *et seq.***

**REPLY OF  
OFFICE OF THE ATTORNEY GENERAL,  
DIVISION OF CONSUMER COUNSEL**

Pursuant to Rule 170 of the Commission's Rules of Practice and Procedure ("Rule 170") and Paragraph 7 of the Hearing Examiner's Protective Ruling and Additional Protective Treatment for Extraordinarily Sensitive Information ("Paragraph 7") in this matter, the Office of the Attorney General, Division of Consumer Counsel ("Consumer Counsel") hereby files the following Reply to the responses filed by Appalachian Voices, Commission Staff, and Virginia Electric and Power Company ("VEPCO" or "Company") to Consumer Counsel's July 24, 2020 Motion for Ruling on Confidentiality of Information ("Motion").

**INTRODUCTION**

Consumer Counsel filed its Motion on July 24, 2020 challenging VEPCO's Extraordinarily Sensitive designation of certain information the Company provided in response to discovery requests of Staff and Appalachian Voices. The information regards the results of generation unit-specific net present value ("NPV") analyses, with sensitivities. The NPV analysis results are found on page 3 of each of two presentations produced in response to Staff Interrogatory 1-17 ("Attachment Staff Set 01-17(a) ES") and Appalachian Voices Interrogatory

3-2 (“Attachment APV 03-02(a) ES”), eight and ten pages in length, respectively, both of which are entitled “Unit Analysis.” Page 3 of each presentation bears the heading “10-year NPV Results.”<sup>1</sup> The information does not show any inputs into the NPV analyses, but only the high-level results.

On July 30, 2020, Appalachian Voices filed a response in support of Consumer Counsel’s Motion. Appalachian Voices noted in its response that, “[g]iven the fact that the Company regularly discloses this same sort of information when it seeks a certificate of public convenience and need for a new generation facility, the interest in public disclosure certainly outweighs any claimed commercial sensitivities.”<sup>2</sup>

On July 31, 2020, Staff filed a response also in support of Consumer Counsel’s Motion. Staff considered it “unclear . . . how these high-level summary results could be used to the advantage of capacity market participants,” citing examples of related information that the Company *has* made public in its 2020 Integrated Resource Plan.<sup>3</sup> Staff also pointed out that Paragraph 12 of the Hearing Examiner’s Protective Ruling and Additional Protective Treatment for Extraordinarily Sensitive Information (“Paragraph 12”) imposes on the Company an “obligat[ion] to separate to the fullest extent practicable non-confidential documents, materials and information from Confidential Information and to provide the non-confidential documents, materials and information without restriction.”<sup>4</sup>

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<sup>1</sup> Thirty-five sets of discovery have been served by Staff, Consumer Counsel, and other parties in this case to date, and in 18 of those sets – more than half of the responses – VEPCO has asserted confidentiality of information. Consumer Counsel’s Motion for public disclosure is limited to only two individual pages from among all the discovery produced with Confidential or Extraordinarily Sensitive designations by the Company.

<sup>2</sup> Environmental Respondent’s Response in Support of Consumer Counsel’s Motion for Ruling on Confidentiality of Information (“APV Response”) at 2.

<sup>3</sup> Response of Commission Staff to Motion for Ruling on Confidentiality of Information (“Staff Response”) at 3.

<sup>4</sup> *Id.* at 4.

Also on July 31, 2020, the Company filed its response defending confidential treatment of the results of the NPV analyses.<sup>5</sup> The Company characterizes the harms that would flow from disclosure as “increased costs for the Company to operate its system.”<sup>6</sup> These alleged harms are not sufficiently compelling to overcome the presumption that transparency is appropriate.

At bottom, VEPCO’s response suggests that interested stakeholders, customers, and the communities that support the Company’s generation units should be kept in the dark for their own good. By appealing to the protection of its customers in defense of shielding NPV information from the public, the Company turns Rule 170 on its head. The Commission should reject this logic and direct the Company to produce the results of the NPV analyses in public form.

#### APPLICABLE LAW

With respect to information designated Confidential by the Company, Rule 170 provides that “[u]pon challenge, the information shall be treated as confidential pursuant to these rules only where the party requesting confidential treatment can demonstrate to the satisfaction of the commission that the risk of harm of publicly disclosing the information outweighs the presumption in favor of public disclosure.” A “presumption . . . operates to shift to the opposing party the burden of producing evidence tending to rebut the presumption.”<sup>7</sup> Accordingly, if the Commission or Hearing Examiner is not satisfied by the Company’s showing of a risk of harm, the information must be made public by operation of law.

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<sup>5</sup> The Company seems to convey that it would be amenable to reducing the classification of the NPV analysis results from Extraordinarily Sensitive to Confidential. For the reasons discussed in Section D, any level of confidentiality is inappropriate for the NPV analysis results.

<sup>6</sup> VEPCO Response at 6.

<sup>7</sup> *Martin v. Phillips*, 235 Va. 523, 526, 369 S.E.2d 397, 399 (1988).

## DISCUSSION

**A. The public interest in the NPV analysis results is both legally presumed and apparent on the facts of this case.**

As noted above, by the terms of Rule 170, the interest in public disclosure of information is presumed as a general matter, and if VEPCO does not make an adequate showing of a risk of harm that overcomes that presumption, the Company may not maintain its designation of the information as Confidential. More specifically, the Commission ruled in the Company's 2018 IRP proceeding that "[a] primary purpose of an IRP . . . is to give the public – which includes customers and the legislators who represent them – a reasonably accurate picture of the probable costs that customers will pay in the future to receive a reliable supply of electrical power, which is essential to modern life and commerce."<sup>8</sup>

Consumer Counsel contests the Company's unsupported statement that "the NPV Information does not link to 'probable costs that customers will pay in the future to receive a reliable supply of electric power.'"<sup>9</sup> The NPV analysis results show, under an array of sensitivities, the expected economic impact – positive or negative – on customers of continued operations at discrete generation facilities as compared to viable market alternatives. A positive NPV means that VEPCO projects that its customers will receive an economic benefit over the study period, or put more simply, that its customers will pay less to receive future electrical power. A negative NPV means that the Company projects that its customers will incur a negative financial impact over the study period, or that its customers will pay more to receive future electrical power. VEPCO thus defies all logic when it asserts that NPV analysis results –

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<sup>8</sup> *Commonwealth of Virginia, ex rel. State Corporation Commission, In re: Virginia Electric and Power Company's Integrated Resource Plan filing pursuant to Va. Code § 56-597 et seq.*, Case No. PUR-2018-00065, Final Order at 3-4 (Jun. 27, 2019) ("2018 VEPCO IRP Final Order"), <https://scc.virginia.gov/docketsearch/DOCS/4hfb011.PDF>.

<sup>9</sup> VEPCO Response as 10.

not to mention questions as to whether the Company is making reasonable decisions related to their economic analyses – are not linked to costs that customers will pay.

Perhaps acknowledging the strong interest in public disclosure of this information, VEPCO appeals to a hearing examiner's ruling in the Company's 2013 IRP proceeding that "neither the nature of the proceeding, nor the level of public interest in a proceeding should have any impact on the determination of whether the risk of harm of publicly disclosing the information outweighs the presumption in favor of public disclosure."<sup>10</sup> VEPCO notes in a cursory fashion that the Commission adopted the ruling but, in doing so, the Company omits a key point in the Commission's ruling. The Commission found that "[i]n *proceedings such as this*, keeping information confidential – which otherwise would be treated as public – restricts unnecessarily the full public development of the record and result of such cases."<sup>11</sup> This language is consistent with the Commission's statement in the 2018 VEPCO IRP Final Order that "[a] primary purpose of an IRP . . . is to give the public . . . a reasonably accurate picture of the probable costs that customers will pay in the future to receive a reliable supply of electrical power."<sup>12</sup> The Company's assertion, that "public interest in a proceeding before the Commission should not factor into a determination on confidentiality under Rule 170,"<sup>13</sup> ignores

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<sup>10</sup> *Id.* at 9 (quoting *Commonwealth of Virginia, ex rel. State Corporation Commission, In re: Virginia Electric and Power Company's Integrated Resource Plan* filing pursuant to § 56-597 et seq. of the Code of Virginia, Case No. PUE-2013-00088, Hearing Examiner's Ruling at 8 (Apr. 21, 2014) ("2013 VEPCO IRP Hearing Examiner's Ruling"), <https://scc.virginia.gov/docketsearch/DOCS/2x81011.PDF>).

<sup>11</sup> *Commonwealth of Virginia, ex rel. State Corporation Commission, In re: Virginia Electric and Power Company's Integrated Resource Plan* filing pursuant to § 56-597 et seq. of the Code of Virginia, Case No. PUE-2013-00088, Order at 7 (June 5, 2014) (emphasis added), <https://scc.virginia.gov/docketsearch/DOCS/2xvm011.PDF>.

<sup>12</sup> 2018 VEPCO IRP Final Order at 3.

<sup>13</sup> VEPCO Response at 9.

the Commission's plain declarations that the public nature of proceedings is especially important in IRP proceedings.<sup>14</sup>

The Company also perplexingly claims that legislative interest in the retirement of certain generation facilities while debating the recently enacted Virginia Clean Economy Act ("VCEA") is "not germane to the issues in the current proceeding."<sup>15</sup> The Commission, in enunciating the informative purpose of IRP proceedings, was clear that the public "includes customers *and the legislators who represent them.*"<sup>16</sup> This is presumably why the Company included in its 2020 IRP an entire Addendum addressing another subject of debate surrounding the VCEA – the bill impact that the VCEA may have on the Company's customers over the planning horizon.<sup>17</sup>

Taken together, there is no question that the interest in public disclosure is both legally presumed and compelling as a matter of fact.

**B. VEPCO exaggerates the potential harms that could arise from public disclosure.**

VEPCO attempts to overcome this compelling and Commission-declared interest in public disclosure of the NPV analysis results with overstated claims of harm. The primary harm cited by the Company is the potential for "increased costs for the Company to operate its system"<sup>18</sup> and the Company warns that disclosing the results of the NPV analyses would "show the Company's hand"<sup>19</sup> in negotiations for goods and services.

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<sup>14</sup> Consumer Counsel does not disagree with the hearing examiner's finding that "public interest or participation in a proceeding should not alter the determination of the risk of harm." 2013 VEPCO IRP Hearing Examiner's Ruling at 13. Rather, in the Reply, Consumer Counsel's position is that, consistent with Commission order, the *purpose* of an IRP proceeding to inform the public about expected costs further bolsters the Rule 170 presumption – that information should be public – in the IRP context.

<sup>15</sup> VEPCO Response at 10.

<sup>16</sup> 2018 VEPCO IRP Final Order at 3.

<sup>17</sup> Virginia Addendum 1 to the 2020 Integrated Resource Plan of Virginia Electric and Power Company (May 1, 2020).

<sup>18</sup> VEPCO Response at 6.

<sup>19</sup> *Id.* at 5.



VEPCO discusses in detail only two examples of such goods and services: securing fuel supply for generation units and sufficient capacity for system reliability.<sup>20</sup> With respect to fuel, the Company's response is concerning. The Company states that fuel suppliers that see a highly positive NPV figure for a unit they are supplying "may use that information to their advantage to demand higher prices" and that fuel suppliers that see a highly negative NPV figure "may seek other buyers for the fuel in anticipation of a unit retirement."<sup>21</sup>

With respect to units that may bear negative NPV results, VEPCO's public 2020 IRP frankly already sends this message to fuel suppliers; any such claimed harm is already incurred. For instance, as noted by Staff,<sup>22</sup> Appendix 5D to the 2020 IRP shows publicly available projected capacity factors for all of its generation units. These capacity factor figures include, for the next ten years:

- Altavista, projected to have a capacity factor ranging from a high of 72.5 percent in 2022 to a low of 4.6 percent in 2024;
- Southampton, projected to have a capacity factor ranging from a high of 60.1 percent in 2022 to a low of 3.6 percent in 2024;
- Hopewell, projected to have a capacity factor ranging from a high of 59.2 percent in 2022 to a low of 3.8 percent in 2024; and
- Virginia City Hybrid Energy Center ("VCHEC"), projected to have a capacity factor ranging from a high of 10.8 percent in 2025 to a low of 5.7 percent in 2020. On average over the next ten years, VCHEC is expected to have a capacity factor of 7.73 percent over the next ten years.

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<sup>20</sup> *Id.* at 5-6.

<sup>21</sup> *Id.* at 5.

<sup>22</sup> Staff Response at 3.

These low capacity factors already signal that VEPCO expects to severely cut back production at these facilities.

The same goes for the Company's claims regarding its position in the PJM capacity market. As Staff noted in its response, "[i]t is unclear . . . how these high-level summary results could be used to the advantage of capacity market participants, particularly given that portions of the results of the retirement analysis (albeit at an even higher level) are already provided publicly in the 2020 IRP in Figure 5.2.1.1.<sup>23</sup> Staff further highlighted that "the 2020 IRP publicly discloses potential unit retirements in Appendix 5J" and "the busbar screening results showing the levelized cost of energy for various types of generating resources at different capacity factors is publicly disclosed in Appendices 5M and 5N."<sup>24</sup>

At any rate, the Company is already known to be a "price taker" in PJM's Reliability Pricing Model, meaning that while the Company has leeway in submitting its bids, it generally will bid in a price that will clear the market because the Company receives out-of-market compensation for the same units through its cost of service rates.<sup>25</sup> Moreover, the Company's own IRP has indicated that it is considering exiting from the PJM capacity auctions.<sup>26</sup>

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<sup>23</sup> Staff Response at 3.

<sup>24</sup> *Id.* at 3-4.

<sup>25</sup> See, e.g., *Application of Virginia Electric and Power Company, For revision of rate adjustment clause: Rider US-3, Colonial Trail West and Spring Grove 1 Solar Projects, for the rate year commencing June 1, 2020*, Case No. PUR-2019-00104, Rebuttal Testimony of J. Scott Gaskill on Behalf of Virginia Electric and Power Company at 2-3 (Dec. 19, 2019) ("[T]he Company's generating assets sell their capacity into the capacity market, generally receiving revenue based on their committed capacity (in MW) times the capacity clearing price (in \$/MW-day)", <https://scc.virginia.gov/docketsearch/DOCS/4k%238011.PDF>; *Commonwealth of Virginia, ex rel. State Corporation Commission, In re: Virginia Electric and Power Company's Integrated Resource Plan filing pursuant to Va. Code § 56-597 et seq.*, Case No. PUR-2018-00065, Hr'g Tr. 526:8-17 (Staff Witness Earnest White, Jr.) ("[E]ssentially right now the Company, being a vertically integrated utility, PJM presumes that we in this IRP proceeding will vet their resource adequacy claims. From there, PJM says, we will allow vertically integrated utilities to bid their capacity into the market, essentially as price takers or at zero bid, to ensure they clear."), <https://scc.virginia.gov/docketsearch/DOCS/4c0q011.PDF>.

<sup>26</sup> 2020 IRP at 14 ("The Company is closely following the developments in the PJM forward capacity market, including the Federal Energy Regulatory Commission ('FERC') Minimum Offer Price Rule ('MOPR') proceedings, and is considering its options, including election of the fixed resource requirement ('FRR') alternative.")

These considerations make plain that the harms the Company contends will arise from public disclosure are either unlikely to become manifest or have already been incurred. The Company has failed to carry its burden of proof under Rule 170.

**C. VEPCO's other quibbles with Consumer Counsel's Motion are without merit.**

VEPCO offers two additional meritless criticisms of the Motion. First, in reference to Consumer Counsel's note that the Company routinely offers NPV values publicly in certificate of public convenience and necessity ("CPCN") cases, the Company charges that Consumer Counsel "fails to recognize the importance of the distinct contexts."<sup>27</sup> To support the proposition that the Commission "has *consistently* recognized the difference between [IRP] proceedings and other types of proceedings,"<sup>28</sup> the Company cites a general caveat offered by the Commission at the beginning of a 2017 hearing that "issues limited to [CPCN or rate recovery] proceedings are not part of this IRP case and never have been a part of any IRP."<sup>29</sup> Consumer Counsel does not disagree that certain issues may be relevant to other types of proceedings that are not relevant to IRP proceedings. Consumer Counsel, however, is not seeking the admission of evidence that is not relevant, but the declassification of information that VEPCO has provided, without objection on relevance grounds, under an Extraordinarily Sensitive designation. Consumer Counsel also readily concedes that the type of proceedings in which this *same kind of information* was publically revealed were conducted under different statutes. For the question at hand, though – whether VEPCO has demonstrated a sufficient risk of harm of publicly disclosing the information – the context of the proceeding has nothing to do with the risk of harm to the

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<sup>27</sup> VEPCO Response at 8.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* (quoting *Commonwealth of Virginia, ex rel. State Corporation Commission, In re: Virginia Electric and Power Company's Integrated Resource Plan* filing pursuant to Va. Code § 56-597 et seq., Case No. PUR-2017-00051, Hr'g Tr. 7:13-16; 8:22-9:2, <https://scc.virginia.gov/docketsearch/DOCS/3hv9011.PDF>).

Company.<sup>30</sup> Quite simply, if making the NPV analysis results public in this case is harmful, it would have been equally harmful in the CPCN context. There is no “stark contrast”<sup>31</sup> between IRP proceedings and CPCN proceedings with respect to how harmful disclosing NPV results may be to the Company. And the Company’s own response admits that the type of information that Consumer Counsel seeks to declassify is the type of information that has been publically made available in CPCN proceedings.<sup>32</sup>

VEPCO also highlights the inconsequential fact that it has protected NPV results in prior IRP proceedings without contest from Consumer Counsel or other parties.<sup>33</sup> The Company does not offer – nor is Consumer Counsel aware of – any estoppel principle to the effect that not contesting the confidentiality of information in a prior proceeding bars a party from contesting the confidentiality of similar information in the present proceeding. Many factors beyond the ultimate question may go into a party’s decision not to challenge a confidentiality designation.

If parties could be barred, through inaction, from ever challenging the confidentiality of similar information again, they would be forced to assert every colorable claim that information should be made public. This outcome neither appears to be the intent behind Rule 170 nor likely would such practice promote judicial economy.

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<sup>30</sup> Consumer Counsel notes the inconsistency in VEPCO’s response on this issue, as elsewhere it quotes the hearing examiner’s ruling in the Company’s 2013 IRP proceeding that “the nature of the proceeding . . . should [not] have any impact on the determination of whether the risk of harm of publicly disclosing the information outweighs the presumption in favor of public disclosure.”

<sup>31</sup> VEPCO Response at 8.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 9.

**D. Reducing the classification from Extraordinarily Sensitive to Confidential is a red herring offered by the Company that would do nothing to satisfy the presumed interest in public disclosure of the NPV analysis results.**

Finally, in a footnote in its response, VEPCO signals its openness to reducing the level of protection of the NPV analysis results from Extraordinarily Sensitive to Confidential.<sup>34</sup> The Company requests this treatment “should the Hearing Examiner find that it does not strictly fall into the definition of Capacity Market Information” while suggesting that any party who wishes to may file a notice of participation by August 4 – the date on which this Reply is due and by which no determination on this Motion will have been made – and execute a protective agreement.<sup>35</sup> This “concession” is nothing more than a red herring that misconstrues the Motion as one seeking a lesser degree of protection rather than availability to the public, and Consumer Counsel notes that granting this limited change of designation would not provide the relief sought by this Motion.

**CONCLUSION**

For the reasons given above, Consumer Counsel requests that the Commission grant its Motion for Ruling on Confidentiality of Information and direct VEPCO to produce Attachment Staff Set 01-17(a) ES and Attachment Staff Set 03-02(a) ES in public form.

Respectfully submitted,

DIVISION OF CONSUMER COUNSEL  
OFFICE OF THE ATTORNEY GENERAL

/s/ John E. Farmer, Jr.  
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<sup>34</sup> VEPCO Response at 4 n.8.

<sup>35</sup> *Id.*

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